No. 14-912

IN THE

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

v.

COLLIN LLOYD-DOUGLAS,

Respondent.

On Petition For A Writ of Certiorari to the New York State Court of Appeals

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY

This case is about the meaning of *Miranda*.[1] Its resolution will not only determine the fate of the two defendants before this Court in these companion cases[2] – determining whether their reliable, voluntary, videotaped confessions should be withheld from the jury at their pending retrials, thus significantly reducing the likelihood of their conviction – but it will also directly answer the question of whether or not the constitutional rights of more than eleven thousand New Yorkers were violated when they were interviewed in Queens County prior to arraignment between 2007 and 2013, with the same or similar standardized remarks read to them prior to the administration of *Miranda* warnings.[3] This case will, thus, determine whether the large number of those defendants convicted at trial or upon a guilty plea can now directly or collaterally challenge their convictions on the grounds that, notwithstanding the denial of

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] The Court of Appeals decided this case together with *People v. Dunbar*, from which the State also seeks certiorari in a separate petition.

[3] Defendant is wrong in contending that the standardized remarks at issue in this case were abandoned in 2010 (*see* Defendant's Opposition at 12). While the content of the interviewers' preliminary remarks was amended several times from June 28, 2007 to the present, the use of all of the specific lines deemed by the Court of Appeals to contravene the *Miranda* warnings was not suspended until after the Appellate Division's decision in this case on January 30, 2013. By that time, these standard remarks had been read to approximately 11,836 suspects, 8,769 of whom waived their rights and made a statement.

their suppression motions because their statements were voluntary and made only after they waived a full complement of *Miranda* rights, automatic suppression would, nonetheless, have been mandated as a matter of federal constitutional law.[4]

Further still, this case will clarify, or prevent the Court of Appeals' re-definition, of the breadth of *Miranda*'s rule of automatic suppression for the 19.7 million citizens in New York State, and for the citizens of any other states that might choose to follow this landmark decision of New York's highest court, which has announced, purely as a matter of federal constitutional law, and for the first time anywhere, a rule that law enforcement's pre-*Miranda* remarks -- which do not themselves constitute interrogation and which do not elicit any pre-*Miranda* statement by the suspect -- can still require automatic suppression of what all parties and the court agreed was a voluntary, reliable, videotaped confession made only after a full recitation, acknowledgment, and waiver of *Miranda* rights. Under these circumstances, defendant's attempt to minimize the scope or significance of the Court of Appeals' decision, so as to claim that certiorari is not warranted, should be rejected.

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[4] Notably, in New York State, a motion to vacate judgment under N.Y. Crim. Proc. Law §440.10 has no time limit. And, pursuant to state statutory law, a suppression claim is not waived by a plea of guilty, and can thereafter be litigated on appeal. *See* N.Y. Crim. Proc. Law §710.70(2).

A. This Case, and the Issue it Addresses, is Definitely Not "Moot."

Defendant contends that because the Queens County District Attorney's Office modified the standardized pre-*Miranda* remarks read to suspects before their pre-arraignment interviews so as to comply with the state courts' decisions criticizing or invalidating portions of the remarks, pending further appellate review, "the issue is moot." (Defendant's Opposition at 12). To the extent that defendant seeks to invoke "mootness" as a jurisdictional bar to this Court's review as a result of the District Attorney's attempt to avoid jeopardizing further convictions, while still actively litigating the constitutionality of his interview program, defendant's argument is legally and logically misplaced.

First, from a legal standpoint, a matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. *See e.g.*, *United States v. Juvenile Male*, __U.S.__,131 S. Ct. 2860, 2864 (2011). Under the United States Constitution, a moot case must be dismissed, as Article Three creates a constitutional limitation on the jurisdiction of federal courts to "cases and controversies." U.S. Const. Art. III. The case before this Court is, most certainly, not "moot," as a very real case and controversy still exists for the defendant – whose conviction has been reversed by the New York Court of Appeals and is now facing a retrial unless certiorari is granted – and for the State, which needs to know whether or not it can properly base its direct case on defendant's voluntary and highly

probative videotaped confession. Indeed, if this Court grants certiorari, its decision will not only govern whether defendant's confession could be properly admitted into evidence at trial, but whether his conviction should have been affirmed.[5] To invoke "mootness" in such a case is to grossly misapply that doctrine.

Second, even in a more general sense, it is well settled that voluntary cessation of conduct once litigation has been threatened or commenced will not be deemed to "moot" a case, and this, in fact, is one of the main exceptions to the mootness doctrine. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000). Here, the exception need not be invoked because there is still an active case or controversy before this Court; but it is instructive in demonstrating that neither the

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[5] Although upon remand from this Court, state courts are always free to determine the case based on their own body of statutory and constitutional law, in this case, the Court of Appeals relied solely on federal constitutional law in holding that *Miranda* warnings were not effectively conveyed. Indeed, it could not have done otherwise, as defendant had never asserted a separate state constitutional claim in the courts below, and affirmatively waived such claim in the Appellate Division at argument. Accordingly, upon remand, the New York Court of Appeals would be jurisdictionally barred from reviewing any such claim, as it is not preserved for appeal as a matter of state law. N.Y. Crim. Proc. Law §470.05. Moreover, the state courts at every level have already rejected any claim that defendant's waiver and statement were not knowing, intelligent, or voluntary; and, ultimately, defendant conceded this point, too. Thus, in this case, as a practical matter, this Court's decision would dictate the final outcome of defendant's appeal upon remand, and, hence, whether his conviction should have been affirmed.

importance of the issue, nor the Court's jurisdiction to review it, has been diminished by the District Attorney's efforts to amend his interview procedure in accord with state court decisions -- even as he was challenging those decisions -- and to thus avoid jeopardizing the validity of future convictions.

B. The Impact of the Court Of Appeals' Decision is Not Limited to One Program in One County, But Has Redefined and Vastly Expanded the Scope of *Miranda*'s Rule of Automatic Suppression for the Entire State of New York and Any Other State That Might Follow It.

To posit, as defendant does in his opposition brief, that the Court of Appeals' decision simply followed "well-settled law," has "no broad application," and is limited to Queens County or this particular interview program, is simply not accurate.[6]

The reality -- known to prosecutors, police, defense attorneys, and defendants alike -- is that an interrogator's interaction with a suspect does not begin with the words "you have the right to remain silent;" nor is it required to. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (*Miranda* warnings must only

[6] Indeed, this argument is contradicted by defense counsel's own website, which describes the case as a "landmark Court of Appeals decision." (http://appad.org/landmark-court-of-appeals-decision-upholds-miranda-rights-in-the-face-of-systematic-anti-miranda-protocol).

precede *interrogation*, not all conversation with law enforcement). Indeed, as an interrogation technique, such approach would be almost comically counterproductive. Instead, interrogators typically begin by introducing themselves, sometimes discussing neutral topics, explaining the interview process, providing background information about the case, or informing suspects what topics they will want to discuss and the type of information that they are looking for. *Miranda v. Arizona*, 384 U.S. at 444 (warnings must be given "prior to any questioning"). Only after such initial interaction is an interviewer required to administer *Miranda* warnings, and, if the suspect subsequently agrees to speak, that is when the *interrogation* -- as opposed to the interaction -- will commence.

By holding that pre-*Miranda* words and conduct of law enforcement -- which do not constitute interrogation or undermine voluntariness -- can nevertheless be judicially deemed to subvert *Miranda* if they suggest to a suspect reasons he might want to speak to interrogators, that he might benefit from doing so, or that the interview is his only opportunity to do so before he is charged, the Court of Appeals has forged a new rule of law, contrary to all existing precedent. In practice, this decision will permit automatic suppression of confessions made in every case in which a court determines that the suspect's pre-*Miranda* interaction with law enforcement might have convinced a reasonable person (even if not the individual suspect before the court) to waive his rights and speak to the police. This is, thus, truly a "landmark Court of Appeals decision," as defense

counsel has acknowledged in a different context (*see* FN 6, *supra*). It vastly expands the breadth and scope of *Miranda*'s rule of automatic suppression to cases where *Miranda* warnings were fully given, acknowledged, and waived before any interrogation or incriminating statements were made, which has simply never been done before. It gives courts unfettered discretion to suppress voluntary, reliable statements like the one in this case, even though the suspect's due process rights were not violated and the suspect fully understands his rights, strategically waives them, and demonstrates his control over the interview and his ability to end it.

While defendant understandably wants to insulate this "landmark" decision from further review, and almost certain reversal, it defies logic to contend that the decision has no impact beyond one interview program in one county. The Court of Appeals' decision in this case has redefined *Miranda*. It will impact every case in which *Miranda* warnings are not the first words uttered -- which means it will impact virtually every interrogation case and all suppression jurisprudence[7] in New York State, and any other state that chooses to follow it. Certiorari is warranted.

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[7] The subsequent recovery of physical evidence or identification testimony resulting from procedures conducted thereafter would likely be vulnerable to the suppression remedy as "fruits of the poisonous tree." *See Wong Sun Et Al. v. United States*, 371 U.S. 471, 503 (1963).

C. The Court of Appeals' Decision is Clearly Wrong as a Matter of Federal Constitutional Law.

Where *Miranda* warnings are fully administered, acknowledged, and waived prior to any custodial interrogation, and prior to the suspect making any statements at all to law enforcement, and where all parties agree that the suspect's subsequent confession is uncoerced and voluntarily made, there can be no basis for suppression. Indeed, prior to the Court of Appeals' decision in this case, no court had ever found *Miranda*'s concerns to be implicated – let alone violated – under such circumstances. Thus, defendant is wrong in contending that the Court of Appeals applied "well-settled law [which] does *not* conflict with any decisions by this Court." (Defendant's Opposition at 7). Rather, that court contravened *Miranda*'s purpose, undermined its simplicity and clarity, misconstrued and misapplied this Court's decisions in *Seibert* and *Powell*, and reached a conclusion at odds with this Court's precedent and all other authority.

As the dissenting judge in the Court of Appeals recognized, "[t]he purpose of *Miranda* is to be sure that suspects are informed of their rights and understand them. That purpose is not undermined when police or prosecutors persuade a properly-informed suspect to waive his or her rights" (16a).

The Court of Appeals' contrary view, that *Miranda* not only requires that a suspect be advised of his rights, but also prohibits law enforcement from

explaining to a suspect why he might want to waive them, finds no support in *Florida v. Powell*, 559 U.S. 50 (2010) and *Missouri v. Seibert*, 542 U.S. 600 (2004), upon which the Court of Appeals and defendant now rely (Defendant's Opposition at 8). This Court in *Powell* expressed no such view; to the contrary, it found *Miranda* satisfied even when the warnings given *did not* include a statement that defendant could have an attorney present while being questioned. *Florida v. Powell*, 559 U.S. at 62. Here, unlike in *Powell*, there is no question that *all* of the *Miranda* warnings were fully conveyed, acknowledged, and waived prior to any interrogation by law enforcement and any statement by defendant. As a result, there is no deficiency in the warnings that needs to be cured by context or requires consideration of the surrounding circumstances to determine their adequacy. To use *Powell's* shield against unwarranted suppression as a sword to invalidate a voluntary waiver following a complete set of warnings is to turn the case on its head.

Likewise, *Seibert* does not support Court of Appeals' decision in any way. That case condemned an interrogation technique where the *Miranda* warnings were only administered after defendant made a pre-warning statement where "little, if anything, of incriminating potential [was] left unsaid," on the grounds that it would be "unnatural" for a suspect not to "repeat at the second stage what had been said before." *Missouri v. Seibert*, 542 U.S. at 616-617. Properly read, then, *Seibert* has no bearing on a statement made after the *Miranda* warnings are properly given, by a defendant who has made no prior inculpatory statement. Indeed, this Court recognized

as much in the years following Seibert. *See, e.g., Bobby v. Dixon*, __U.S.__, 132 S. Ct. 26, 31 (2011)("there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat").

Nevertheless, the influential highest court of one of the nation's most populous states has so misconstrued two of this Court's most significant and seminal post-*Miranda* cases as to risk the undermining of nearly fifty years of previously understood jurisprudence. Where this Court has reiterated as recently as 2010, that voluntary statements made to law enforcement are "an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law," *see Maryland v. Shatzer*, 559 U.S. 98, 108 (2010) (internal quotations omitted), the Court of Appeals, by its reverse reading of *Powell* and *Seibert,* has eroded not only *Shatzer,* but also gravely wounded the simple elegance of *Miranda* while jeopardizing the availability to law enforcement of an evidence stream which the Court has repeatedly recognized is both necessary and desirable.

The two cases at issue in these petitions may well represent the most extreme attempt by any court to enlarge *Miranda* into a vehicle for judicial regulation of the conduct of law enforcement interviews. In basing suppression on a judicial view of whether a hypothetical suspect might have been fooled into waiving his rights, rather than looking at the actual impact of the totality of the circumstances on the suspect before it, the New York Court of Appeals has

opened up an entirely new, certainly fertile, frontier for limiting the admissibility of voluntary statements. The resulting rule announced by the Court of Appeals, that comments made prior to the issuance of textbook *Miranda* warnings will lead to suppression of a subsequent statement as surely as if no *Miranda* warnings were given at all, unquestionably represents an enormous and unwarranted expansion of this Court's holdings, and, therefore, necessitates its review.

CONCLUSION

For the reasons stated above, this Court should grant the State's petition for a Writ of Certiorari.

Respectfully submitted,

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April 9, 2015

CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,669 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 2015

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